

This letter discusses taxation of various kinds of digital photographs, conventional photographs and other souvenirs sold at an amusement park. See 86 Ill. Adm. Code sections 130.2000 and 130.1995, and 86 Ill. Adm. Code 140.101. (This is a GIL.)

June 6, 2006

Dear Xxxxx:

This letter is in response to your letter dated February 8, 2005, in which you request information. We apologize for the delay in responding. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. We believe the issues presented are sufficiently covered in the Department's regulations and letters. In your letter you have stated and made inquiry as follows:

I am submitting this request for a Private Letter Ruling pursuant to 2 Ill. Adm. Code Section 1200.110. I represent TAXPAYER, incorporated under the laws of the State of STATE on November 16, 1981. I have enclosed a copy of Illinois Form 2848, *Power of Attorney*, authorizing me to submit this request on behalf of Taxpayer.

This ruling request concerns the application of the Illinois Retailers' Occupation Tax ('ROT') Act, 35 ILCS 120/1 *et seq.*, Service Occupation Tax ('SOT') Act, 35 ILCS 115/1 *et seq.*, Service Use Tax ('SUT') Act, 35 ILCS 110/1 *et seq.* and Use Tax ('UT') Act, 35 ILCS 105/10 *et seq.*, to the facts outlined in this request. This ruling is sought for all future tax periods during which the related purchases and sales will occur. Taxpayer is not under audit by the Department of Revenue (the 'Department') nor is there any litigation pending with the Department and Taxpayer or its affiliates. To the best of my knowledge, the Department has not previously ruled on the same or a similar issue for Taxpayer or any of its predecessors, nor has the issue been submitted to the Department and withdrawn by Taxpayer before the Department issued a Private Letter Ruling. There is no specific trade secret information discussed in this ruling request.

MATERIAL FACTS

Taxpayer owns, operates and manages theme parks, including amusement and water parks. Generally, Taxpayer's parks offer entertainment and recreational services on an admission basis and feature amusement rides and attractions, water rides, concerts, shows and special events. The parks also engage in food and beverage retailing and souvenir vending.

Taxpayer operates the PARK located in CITY, Illinois (the 'Park'). Photographs of Park guests are sold at the Park in the following four ways.

First, at numerous ride locations throughout the Park, a mechanized camera takes digital pictures of guests as they ride the attraction. As the guests exit the ride, their picture is displayed on a monitor over a counter at the end of the ride building. The guests may purchase the laser-printed photographs separately or they may purchase the photographs in a keychain or photo frame or emblazoned on a T-shirt, coffee mug or similar item ('Souvenir Items'). A third-party owns the equipment used, employs the sales staff and supplies the merchandise. Taxpayer receives a portion of the third-party's gross receipts and is contractually responsible for remitting the sales tax that is collected by the third-party on the full selling price of every photograph and Souvenir Item sold.

Second, third-party concessionaires take digital pictures of guests near the Park entrance. The guests may purchase the laser-printed photographs separately or they may purchase the photographs in or emblazoned on a Souvenir Item. These concessionaires use their own equipment and supply the merchandise. Taxpayer receives a portion of the concessionaires' gross receipts and is contractually responsible for remitting the sales tax that is collected by the concessionaires on the full selling price of every photograph and Souvenir Item sold.

Third, a is [sic] kiosk operated by a third-party concessionaire at which digital pictures are taken of guests to create personalized 3D photographs using a computer to superimpose the guest's picture over a holograph of a superhero, animal or other poster image. The guests may purchase the photograph separately or in a frame. The concessionaire uses its own equipment and supplies the frames. Taxpayer receives a portion of the concessionaire's gross receipts and is contractually responsible for remitting the sales tax that is collected by the concessionaire on the full selling price of every photograph and frame sold.

Finally, there are fourteen coin-operated photo booths located throughout the Park owned by third-party. These booths dispense 'four-on-a-strip' photographs. Twelve of the photo booths operate with chemicals and treated film paper (wet photo process). The remaining two booths use a digital format to create the photographs. Taxpayer receives a portion of the third-party owner's gross receipts from the photo booths. No tax is collected in connection with photo booth usage at the Park.

TAX ISSUES AND TAXPAYER'S POSITION

Taxpayer believes that under the description of 'digital photography' in 86 Ill. Adm. Code 130.325(b)(1)(E), which states that printing of 'digital photography' includes 'use of a qualifying integrated computer and printer system to print a digital image', all of the photographs sold at the Park other than those taken by the twelve photo booths that employ a conventional photo process are digital photographs. Thus, sales of such photographs are not sales of 'products of photoprocessing' subject to ROT. See 35

ILCS 120/2. Instead, the sales are governed by the SOT / SUT rules. See 86 Ill. Adm. Code 130.2000(b)(3), (c); see, e.g. ST 99-0333-GIL (11/8/99); ST 98-0088-GIL (3/23/98). Under those rules, sellers of digital photography may calculate the tax base in one of four ways: (1) by separately stating the selling price of the tangible personal property being transferred and collecting tax on that amount (so long as the tax base is not less than the cost price of that property); (2) by collecting tax on 50% of the entire bill (again, the tax base may not be less than the cost price of the tangible personal property transferred); (3) by paying SOT on the cost price of the tangible personal property being transferred if they are registered as 'de minimis' servicemen (and then collecting corresponding SUT from their customers); or (4) by paying UT to their suppliers or self-assessing and remitting UT to the Department on the cost price of the tangible personal property being transferred if they are 'de minimis' servicemen and are not otherwise required to be registered under the ROT Act. Therefore, when digital photographs are sold as separate items at the Park, without any Souvenir Item or frame, Taxpayer or the applicable concessionaire may collect tax on the separately stated cost of the film and other materials used to create the photographs or, alternatively, on 50% of the bill to the customer.

However, Taxpayer is unsure of its responsibility when digital photographs are sold as part of Souvenir Items or are sold as personalized 3D photographs in a frame. ST 89-0531-PLR (9/8/89) addressed sales of photographs as part of token items. In this ruling, where the taxpayer sold Polaroid instant Santa and Easter photos contained in decorative mounting or frames, the Department ruled that tax was owed on the film and mounting or frames which were transferred incidental to providing the photographic services to customers, and that the taxpayer could either separately state on its invoices the selling price of 'tangible personal property transferred incident to service' or collect tax on 50% of the entire bill.

However, in ST 93-0090-PLR (3/15/93), a professional photographer charged a lump sum for conventional photographs included in albums or frames selected by the customer. The Department's position was that a sale by a professional photographer of albums and frames as part of a package is not a sale of 'products of photoprocessing' but instead is a retail transaction, and the photographer must apportion the selling price to these items and charge tax on 100% of their selling price. Although the Department did not specifically state this, it appears that the photographer could collect tax on the remainder of his charges based on the special rates for products of photoprocessing. In ST 95-0507-GIL (12/27/95), the Department reiterated this position on sales by conventional photographers of 'tangible personal property, such as albums and frames.'

Taxpayer's position is that (1) digital photographs placed in or emblazoned on Souvenir Items or sold as personalized 3D photographs in a frame are akin to specialized, custom-made products, (2) sales of such items are incident to the service of transferring an image to the customer and therefore (3) that, in accordance with the Department's ruling in ST 89-0531-PLR, Taxpayer or the applicable concessionaire may collect tax on such a customized Souvenir Item or 3D photograph based upon the separately stated cost price of such item or, alternatively, on 50% of the bill to the customer and (4) it is not necessary to allocate a portion of the sales price to the Souvenir Item or frame itself and collect ROT on 100% of the selling price of the item or frame.

Finally, with regard to the photo booths at the Park, in accordance with the Department's General Information Letter discussing taxation of photo booth photos (ST 98-0088-GIL, 3/23/98), it is Taxpayer's position that coin-operated photo booths are

'computerized photo operations' as described in the letter. Therefore, photographs taken by such photo booths are subject to the same SOT / SUT rules discussed above. As such, the third-party owner may pay UT on the cost of the materials used in the photo process if such cost is less than 35% of the sales price of the photographs and the owner is not otherwise required to be registered under the ROT Act.

RULINGS REQUESTED

Taxpayer respectfully requests a Private Letter Ruling that:

1. Other than those photographs taken by the twelve photo booths at the Park that employ a conventional photo process, all photographs described in this ruling request are 'digital photography' within the meaning of 86 Ill. Adm. Code 130.325(b)(1)(E) and 130.2000(b)(3).
2. When digital photographs are sold as a [sic] separate items at the Park, without any Souvenir Item or frame, Taxpayer or the applicable concessionaire may collect SUT on the separately stated cost of the film and other materials used to create the photographs or, alternatively, on 50% of the bill to the customer.
3. Whenever Taxpayer or a concessionaire sells a digital photograph placed in or emblazoned on a Souvenir Item or superimposed over a holograph and sold in a frame, it (i) may collect SUT from the customer on the separately stated cost of the materials used to create the photograph and Souvenir Item or frame or, alternatively, on 50% of the bill to the customer and (ii) does not have to collect ROT on the Souvenir Item or frame.
4. Photographs taken by photo booths at the Park are not subject to ROT and the third-party owner of the booths may pay UT on its cost of materials if such cost is less than 35% of the sales price of the photographs and the owner is not otherwise required to be registered under the ROT Act.

If you have any questions or comments, please do not hesitate to call me.

DEPARTMENT'S RESPONSE

The information you have provided states that of the five ways photographs are prepared and sold to guests, four of them employ digital photography. The fifth way involves a conventional wet photo process. The Department's regulation, "Graphic Arts Machinery and Equipment Exemption," provides that "'[d]igital printing and quick printing' mean the printing of graphical text or images by a process utilizing digital technology.... It also includes the printing of what is commonly known as 'digital photography' (e.g., use of a qualifying integrated computer and printer system to print a digital image)." 86 Ill. Adm. Code 130.325(b)(1)(E). Under the Department's regulation, "Persons Engaged in the Printing, Graphic Arts or Related Occupations, and Their Suppliers," "[t]he sale of digital photography is not a sale of products of photoprocessing." 86 Ill. Adm. Code 130.2000(b)(3). As several letters have noted, sales of digital photography are subject to Service Occupation Tax. See 86 Ill. Adm. Code 140.101.

Under the Service Occupation Tax, servicemen are taxed on tangible personal property that they transfer incident to sales of service. Servicemen may calculate their tax base in one of four ways: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on the

cost price if they are registered de minimis servicemen; or, (4) Use Tax on the cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. Upon selling their product, they are required to collect the corresponding Service Use Tax from their customers. See 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See 86 Ill. Adm. Code 140.101(f). This class of registered de minimis servicemen are authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers. See 86 Ill. Adm. Code 140.108. Please note that the tax base for this method is the cost price of the tangible personal property actually transferred to the customer. It does not include the cost of supplies that the serviceman may need to produce the item unless the supplies are part of the item transferred to the customer.

The final method of determining tax liability may be used by de minimis servicemen not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. Those servicemen are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. Those servicemen are also not liable for Service Occupation Tax. It should be noted that servicemen do not have the option of determining whether they are de minimis using a transaction-by-transaction basis. See 86 Ill. Adm. Code 140.109.

For example, if a digital photograph is sold as a separate item, and the serviceman calculates the tax using the first method, the tax is based on the separately stated selling price of the photograph. If the serviceman calculates the tax using the second method, the tax is based on 50% of the total selling price of the entire bill. If the serviceman is eligible and chooses to calculate the tax using the third method, the tax is based upon the cost price of the photograph transferred incident to the sales of service. Finally, if the serviceman is eligible and chooses to calculate the tax using the fourth method, the serviceman may pay Use Tax based on the cost price of the photograph to his supplier or may self assess and remit Use Tax to the Department when making purchases of tangible personal property from unregistered out-of-State suppliers. Servicemen who are eligible to pay Use

Tax rather than Service Occupation Tax under the fourth method of calculating tax are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability.

These methods of calculating Service Occupation Tax or Use Tax also apply to sales of digital photographs sold in a souvenir item format such as transferred onto a tee shirt, mug or key chain, or sold from a vending machine as "four-on-a-strip" photographs. Retailers' Occupation Tax does not apply to these sales. You also mentioned selling frames, however we do not have enough information about the frames to provide guidance.

In regard to sales of "four-on-a-strip" photos created with chemicals and treated film paper (wet photo process), we refer back to 86 Ill. Adm. Code 130.2000. Under this regulation, photographers, film makers, and other servicemen are subject to Retailers' Occupation Tax on the photoprocessing component of the total service charge when they sell products of photoprocessing.

If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote
Associate Counsel

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